

#2017-09

Steven J. Onysko

RECEIVED
JAN 25 2017
Per 30

Nova Dubovik
Executive Secretary
State Records Committee
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Salt Lake City, UT 84101-1106
Phone: 801-531-3834
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Ms. Dubovik:

Subject: Nonresponsive Reply and Denial from Department of Human Resource Management Representative Michelle Watts to December 19, 2016, GRAMA Request from Steven Onysko to DHRM, and,

DHRM chief administrative officer's failure to make Title 63G-2-401(5)(a)(ii) time-specified decision on January 17, 2016, GRAMA appeal of January 4, 2017, GRAMA request denial; and,

Title 63G-2-401(5)(b)(i) equivalence of this circumstance to the DHRM chief administrative officer's decision affirming the access denial; and,

Records Committee appellant Steven Onysko's Title 63G-2-402 appeal of the DHRM chief administrative officer's decision (affirming the access denial) to the State Records Committee;

This communication to you is my GRAMA-related appeal per:

Title 63G-2-401. Appeal to chief administrative officer – Notice of the decision of the appeal.

...
(5)

(a) The chief administrative officer shall make a decision on the appeal within:
(i) five business days after the chief administrative officer's receipt of the notice of appeal; or

(ii) 12 business days after the governmental entity sends the notice of appeal to a person who submitted a claim of business confidentiality.

(b)

(i) If the chief administrative officer fails to make a decision on an appeal of an access denial within the time specified in Subsection (5)(a), the failure is the equivalent of a decision affirming the access denial.

Title 63G-2-402. Appealing a decision of a chief administrative officer.

(1) If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may:

(a)

(i) appeal the decision to the records committee, as provided in Section 63G-2-403; or

...

(2) A requester who appeals a chief administrative officer's decision to the records committee or a local appeals board does not lose or waive the right to seek judicial review of the decision of the records committee or local appeals board.

(3) As provided in Section 63G-2-403, an interested party may appeal to the records committee a chief administrative officer's decision under Section 63G-2-401 affirming an access denial.

I am aware of my following obligations:

Title 63G-2-403(2).

(2) The notice of appeal shall:

(a) contain the name, mailing address, and daytime telephone number of the records committee appellant;

(b) be accompanied by a copy of the decision being appealed; and

(c) state the relief sought.

Title 63G-2-403(3).

(3) The records committee appellant:

(a) shall, on the day on which the notice of appeal is filed with the records committee, serve a copy of the notice of appeal on:

(i) the governmental entity whose access denial is the subject of the appeal, if the records committee appellant is a requester or interested party; or

(ii) the requester or interested party who is a party to the local appeals board proceeding that resulted in the decision that the political subdivision is appealing to the records committee, if the records committee appellant is a political subdivision; and

(b) may file a short statement of facts, reasons, and legal authority in support of the appeal.

I have attached a copy of my December 19, 2016, GRAMA request [Exhibit 1], DHRM's January 4, 2017, response [Exhibit 2], my January 16, 2017, appeal to Debbie Cragun, Executive Director, Department of Human Resource Management [Exhibit 3], and her January 17, 2017, acknowledgement that the appeal was received [Exhibit 4].

Relief Sought for Nonresponsive Aspect of DHRM's Reply [Exhibit 2] to My Request [Exhibit 1] and the Chief Administrative Officer's Failure to Reply to the Appeal

I seek the following relief to the nonresponsive aspects of DHRM's reply [Exhibit 2], and the DHRM Chief Administrative Officer's failure to reply to the appeal.

1. Mere written denial of the existence of any records responsive to my request (excluding the one memorandum cited in the response, and addressed below) is unacceptable to me. I require relief in the form of access to all my State of Utah personnel records -- irrespective of classification or category -- so that I may verify myself whether or not there are any records responsive to my request (in addition to the one memorandum cited in the response, withheld from me, and addressed below).

Relief Sought for Denial Aspect of DHRM's Reply [Exhibit 2] to My Request [Exhibit 1] and the Chief Administrative Officer's Failure to Reply to the Appeal

I seek the following relief to the denial aspects of DHRM's reply [Exhibit 2], and the DHRM Chief Administrative Officer's failure to reply to the appeal:

2. DHRM's Watts replied, "DHRM also has a copy of one memorandum containing information about the matter that was the subject of the reprimand. That record is protected under 636-2-305(10)(a), (b), and (d) and will not be provided." The citations refer to:

Title 63G-2-305, Protected Records:

...

(10) records created or maintained for civil, criminal, or administrative enforcement purposes or audit purposes, or for discipline, licensing, certification, or registration purposes, if release of the records:

(a) reasonably could be expected to interfere with investigations undertaken for enforcement, discipline, licensing, certification, or registration purposes;

(b) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings;

...

(d) reasonably could be expected to disclose the identity of a source who is not generally known outside of government and, in the case of a record compiled in the course of an investigation, disclose information furnished by a source not generally known outside of government if disclosure would compromise the source;

Investigation records by themselves are not protected; they are protected only if the other specific conditions stated in the law exist. (Subsection 63G-2-305(10)).¹ DHRM's denial fails to document that the specific conditions under 636-2-305(10)(a), (b), and (d) exist. Therefore, I demand access to the memorandum described in DHRM's response.

3. DHRM's Watts replied, "DHRM has draft copies of the Notice of Intent to Discipline-Written Reprimand. These records are not being provided because they are protected as drafts under Utah Code Ann. Sec. 636-2-305(22), and are privileged as attorney work product and **attorney client communication** under Utah Code Ann. Sec. 636-2-305(18) and (17) respectively. [*Emphasis added.*] And, Watts erroneously has substituted "communication" for "privilege," rendering DHRM's denial illegitimate in its presumption that attorney-client "communication" is always "privileged."

The Utah Supreme Court has ruled that the mere existence of a relationship between a governmental entity and its attorney or attorneys does not rise to the level of being protected under attorney client privilege.¹ The provisions of attorney client privilege are found in the Judicial Code. (Title 78B). The Utah Supreme Court explains that "to rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice." (Southern Utah Wilderness Alliance, V. The Automated Geographic Reference Center, No. 20060813.)¹

DHRM's denial fails in regard to these three tests. I insist that I be granted access to the records that DHRM has denied me per illegitimate invocation of Utah Code Ann. Sec. 636-2-305(17).

GRAMA references "drafts" several times. There are differences at each mention in how GRAMA focuses on how the draft is used to determine its status. A temporary draft is not a record if used temporarily and not maintained by the governmental entity (Subsection 63G-2-103(22)(b)(ii)).¹ A draft is a public record when relied upon to make decisions or take action or if circulated outside of government or a private contractor (Subsection 63G-2-301(3)(j)). A draft is a protected document if it is not a public document (Subsection 63G-2-305(22)).¹

DHRM's denial admits that the drafts still exist, so they do constitute "records." DHRM's denial fails to document that the draft copies were not relied upon to make decisions or take action. DHRM's denial fails to argue or prove that the drafts are not public records. I insist that I be granted access to the draft documents that DHRM has denied me per Watts' illegitimate invocation of Utah Code Ann. Sec. 636-2-305(22).

4. DHRM's Watts replied, "DHRM has draft copies of the Notice of Intent to Discipline - Written Reprimand. These records are not being provided because they are protected as drafts under Utah Code Ann. Sec. 636-2-305(22), and are privileged as **attorney work product** and attorney client communication under **Utah Code Ann. Sec. 636-2-305(18)** and (17) respectively.

The Utah Supreme Court has ruled that records produced in the regular course of business are not protected records under the provision of records prepared in anticipation of litigation.¹ The mere existence of a relationship between a governmental entity and its attorney or attorneys does not rise to the level of being protected under attorney work product.¹ "A document is prepared in the ordinary course of business when it is created pursuant to routine procedures or public requirements unrelated to litigation ... [t]heir mere use in litigation does not render them exempt under GRAMA." (Southern Utah Wilderness Alliance, V. The Automated Geographic Reference Center, No. 20060813.)¹ DHRM's denial fails in this same regard. I insist that I be granted access to the records that DHRM has denied me per illegitimate invocation of Utah Code Ann. Sec. 636-2-305(17).

Respectfully yours,

via email

Steven J. Onysko

cc: Debbie Cragun, Department of Human Resource Management, dcragun@utah.gov
Paul Tonks, Utah Assistant Attorney General, ptonks@utah.gov
Rosemary Cundiff, Utah State Archives and Records Service Ombudsman, rcundiff@utah.gov
Steven Onysko

¹ <https://archives.utah.gov/recordsmanagement/CSS/grama-certification/m3s4.html>